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No. 93-912

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1993

CHARLES E. PRENTICE and JANE G. PRENTICE, husband and wife, on behalf of themselves and all others similarly situated,

*Petitioners,*

v.

TITLE INSURANCE COMPANY OF MINNESOTA, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Wisconsin Supreme Court**

## REPLY OF PETITIONERS TO MDL 633 RESPONDENTS

JAMES MICHAEL CLABAULT*
LAW OFFICE OF
JAMES M. CLABAULT
7323 West Marine Drive
Milwaukee, WI 53223
(414) 351-1005

DAVID W. BROWN
KNOPF & BROWN
1050 Seventeenth Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 785-8200

PETER CARSTENSEN
Professor of Law
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53706
(608) 263-7416

SUSAN LACAVA
LAW OFFICES OF
SUSAN LACAVA
23 North Pinckney Street
Suite 320
Madison, WI 53703
(608) 258-1335

*Attorneys for Petitioners*

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

REASONS FOR GRANTING THE PETITION ..... 1

A. This Court Presumes That a Decision Mixing Federal and State Law Is Decided On Federal Grounds ..... 1

B. This Court Has Jurisdiction In This Case ..... 3

C. Considerations Of Federalism Justify Review ..... 7

# TABLE OF AUTHORITIES

Page

CASES:

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) ..... 4

Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), *cert. granted,* 114 S.Ct. 56 (1993) ..... 7

Caldwell v. Mississippi, 472 U.S. 320 (1985) ..... 2

California v. ARC America Corp., 490 U.S. 93 (1989) ..... 8

Chicago N.W. Transp. Co. v. Thoreson Food Prod., 71 Wis.2d 143, 238 N.W.2d 69 (1976) ..... 4

Coleman v. Thompson, 111 S.Ct. 2546 (1991) .....2, 5

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) ..... 8

Grams v. Boss, 97 Wis.2d 332, 294 N.W.2d 473 (1980) ..... 7

Gregory v. Ashcroft, 111 S.Ct. 2395 (1991)..... 1, 8, 9

Harris v. Reed, 489 U.S. 255 (1989) ..... 2

H. J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485 (8th Cir.), cert. denied 112 S.Ct. 2306 (1992).....3, 10

Keogh v. Chicago and N.W. Railway Co., 260 U.S. 156 (1922)..... 1, 5, 6

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979)..... 7

Louisville & Nashville Railroad Co. v. Maxwell, 237 U.S. 94 (1915) ..... 4

Michigan v. Long, 463 U.S. 1032 (1983) .. 1, 2, 3, 5, 6, 9

Milkovich v. Loraine Journal Co., 497 U.S. 1 (1990) ...2, 5

TABLE OF AUTHORITIES – Continued

Page

New York v. P.J. Video, Inc., 475 U.S. 868 (1986)....2, 5

New York v. United States, 112 S.Ct. 2408 (1992) 1, 8, 9

Prentice v. Title Insurance Company of Minnesota, 176 Wis.2d 714, 500 N.W.2d 658 (1993).....3, 4, 5, 6

Reese v. Associated Hospital Service, 45 Wis.2d 526, 173 N.W.2d 661 (1970)..... 7

Taffet v. Southern Co., 967 F.2d 1483 (11th Cir.), cert. denied 113 S.Ct. 657 (1992).....3, 10

Texas & Pacific Railway Co. v. Mugg, 202 U.S. 242 (1906)..... 4

Three Affiliated Tribes v. Wold Engineering, 476 U.S. 138 (1984).....2-3, 10

Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476 (1991)..... 8

STATUTES:

Federal:

28 U.S.C. § 1257(a) ..... 1

State:

Wis. Stats. (Antitrust Law)

Chapter 133..... 5

§ 133.01(1) ..... 5

§ 133.04(4) ..... 6

§ 133.14..... 6

TABLE OF AUTHORITIES – Continued

Page

SUPREME COURT RULES:

14.1(e) ..... 7

14.1(h) ..... 7

LEGISLATIVE HISTORY:

Committee Comment, Wis. Stat. Ann., Ch. 133 (West 1980) ..... 5

LAW REVIEW ARTICLES:

Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power,* 100 Harv. L Rev. 1485 (1987) ..... 8

Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue,* 42 Duke L.J. 979 (1993) ..... 8

## REASONS FOR GRANTING THE PETITION

The jurisdictional basis of our Petition is 28 U.S.C. § 1257(a). The MDL 633 Respondents in their Opposition Brief, filed on January 10, 1994, have contested this basis while conceding the existence of conflict over the interpretation of *Keogh* and, implicitly, the importance of the substantive issues presented. This Reply explains why this Court has jurisdiction and why any question about such jurisdiction only adds support to the grant of the writ. This case arose under the Wisconsin antitrust laws. But in reaching its decision that the *Keogh* rule barred this action, the Wisconsin court interwove state and federal antitrust law, concluding that federal law " 'controlled' " its decision. Moreover, it failed to identify any independent state ground for its holding. Consequently, this Court has jurisdiction under the standards promulgated in *Michigan v. Long,* 463 U.S. 1032 (1983). Furthermore, the Wisconsin court mistakenly held that federal law controlled its decision and then misinterpreted the federal law it applied. These actions seriously imperil the paradigm of federalism that this Court has crafted in its recent decisions. *E.g., New York v. United States,* 112 S.Ct. 2408 (1992); *Gregory v. Ashcroft,* 111 S.Ct. 2395 (1991). Hence, the full review and reversal in this case will directly contribute to this Court's policy of maintaining the separate spheres of federal and state law.

### A. This Court Presumes That a Decision Mixing Federal and State Law Is Decided on Federal Grounds

In *Michigan v. Long, supra,* this Court established standards for review of state court decisions which rested on federal law or interwove federal and state law:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a

> state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

*Id.* at 1040-1041. Thus, a "conclusive presumption" arises "in those cases where a . . . court has good reason to question whether there is an independent and adequate state ground for the decision." *Coleman v. Thompson*, 111 S. Ct. 2546, 2555, 2559 (1991).

This standard has greatly facilitated the clarification of the separate spheres of state and federal law while avoiding the vexing and complex problems that this Court had confronted previously. *E.g., Harris v. Reed*, 489 U.S. 255 (1989); *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This Court has been broadly inclusive with respect to review of state court decisions which have confounded federal and state law.[1] Also relevant is the analysis in *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1984), in which this Court reviewed the construction of the North Dakota statute regulating the jurisdiction of its own courts, where the source of the interwoven federal question was statutory rather than constitutional and where the error in federal law was indirectly reflected in the state court decision.[2] This Court recognized that state courts may either "construe state law narrowly" or

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[1] *E.g. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 10 n.5 (1990) (review of a defamation question in which the state court's decision relied in turn on another decision which had "relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants. . . . ; *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n.4. (1986) (review of a New York decision involving the scope of protection for allegedly pornographic materials based on the intermixing of federal and state law: "We conclude, in the absence of a 'plain statement' to the contrary, that the decision . . . was premised on federal, not state, law.").

[2] North Dakota's Supreme Court has refused to allow the plaintiffs to pursue a breach of contract action against the defendant in state courts based on a state statute which the court construed to refuse jurisdiction over cases involving Indian tribes.

"broadly" depending on the state court's beliefs about related federal law, and added:

> In both categories of cases, this Court has reviewed the federal question on which the state-law determination appears to have been premised. If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law.

*Id.* at 152. This Court vacated and remanded, noting that it was "far from certain that the [state] court's present interpretation of . . . [the state law] does not rest on a misconception of federal law." *Id.* at 153.

Thus, under our system of federalism, this Court reviews decisions which interweave federal and state law to ensure that the federal law is applicable, and, if so, is correctly applied to avoid distortion of state law. This Court had committed itself to review such decisions, as discussed in Subpart C below, because it is the only forum in which meaningful relief from such errors can be obtained.

### B. The Court Has Jurisdiction In This Case

The *Prentice* decision satisfies both elements of the *Michigan v. Long* test: the result "rest[s] primarily on federal law, or [is] . . . interwoven with the federal law . . . " and no independent state law ground "is . . . clear from the face of the opinion. . . . " 463 U.S. at 1040.[3]

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[3] Prior to the decision, petitioners had urged that Wisconsin-law-based standards should govern the application of the filed tariff doctrine to claims under Wisconsin's antitrust law with respect to unlawful price fixing by insurers regulated by state insurance law. Pet. App. 8, 35. Respondents had advocated that federal law controlled; the Wisconsin court accepted the latter view. In this it is not alone. Other courts have concluded that the filed tariff doctrine applies equally to rates promulgated by state and federal agencies. *E.g., Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir.), *cert. denied*, 113 S. Ct. 657 (1992); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir.), *cert. denied*, 112 S. Ct. 2306 (1992).

1. The Wisconsin court's premise that federal law controlled state law is evident from even a cursory review of the *Prentice* opinion. It focused on federal decisions as the only sources for the filed tariff doctrine. Moreover, the court explicitly reiterated its prior holding that the construction of Wisconsin antitrust law is " 'controlled by federal decisions. . . . ' " Pet. App. 8.

The Wisconsin court attributed the filed tariff doctrine to this Court and also pointed out that two of the foundation cases – *Texas & Pacific Railway Co. v. Mugg*, 202 U.S. 242 (1906) and *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94 (1915) – involved this Court's reversal of state court decisions which had failed to adhere to rates filed with the ICC. The lesson the Wisconsin court drew was that "allowing a *state court* to award damages based on a hypothetical rate lower than the filed rate would undermine the regulatory scheme. . . . " Pet. App. 5 (emphasis added). The court then quoted *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) for the proposition that the filed tariff doctrine "has been extended across the spectrum of regulated utilities." Pet. App. 6, quoting 453 U.S. at 577. *Hall* was another case in which this Court reversed a state supreme court for failing to adhere to the filed tariff doctrine.[4] The Wisconsin court's discussion of its own cases, all outside the antitrust field, states that "this court has applied the filed rate doctrine in different contexts since 1911." Pet. App. 7. Significantly, the only Wisconsin case discussed at length, *Chicago N.W. Transp. Co. v. Thoreson Food Prod. Inc.*, 71 Wis. 2d 143, 238 N.W.2d 69 (1976) (Pet. App. 7-8), involved a situation similar to that in *Hall*, *Mugg* and *Maxwell* in which a shipper tried to avoid paying the full tariff rate filed with a federal regulatory agency. Indeed, in *Thoreson*, the Wisconsin court had declared that "state courts faced with such controversies must apply federal law." 71 Wis. 2d at 147, 238

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[4] As with its citations to *Mugg* and *Maxwell*, the Wisconsin's court's reference to *Hall* took no note of the fact that this Court's filed tariff cases controlled the disposition of state law claims because the particular tariff at issue was federal. Moreover, none of these cases involved a *Keogh* antitrust law question.

N.W.2d at 72 (fn omitted).[5] From there, the court proceeded to the antitrust question, stating that there was no antitrust case in which the Wisconsin "court refused to apply the filed tariff doctrine. Additionally, '[w]e have stated many times that the construction of sec 133.01(1) is controlled by federal decisions under the Sherman Act.' " Pet. App. 8. The court concluded that, combined with its interpretation of the filed tariff doctrine, described above, its "policy of conforming our antitrust decisions to those the United States Supreme Court . . . leads us to adopt the reasoning of the United States Supreme Court's decision in *Keogh.*" Pet. App. 8.

Plainly, the *Prentice* decision reached out to federal law as the basis to limit state law and thereby conclude that the petitioners may not seek antitrust damages in this case. As in *Michigan v. Long,* "the most reasonable explanation [is] that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1040. The reliance on federal law goes well beyond "use[] only for the purpose of guidance. . . . " (*id.* at 1041) and justifies the "conclusive presumption" that federal law controlled. *Coleman v. Thompson,* 111 S.Ct. at 2555.

2. The *Prentice* opinion does not "clearly and expressly" indicate an alternative "bona fide, separate, adequate, and independent grounds . . . " for decision. *Michigan v. Long,* 463 U.S. at 1041; *Coleman v. Thompson,* 111 S. Ct. at 2559. Placing its sweeping filed tariff rule on state grounds alone would have raised some very difficult issues for the court. Neither the legislative history of Wisconsin's antitrust law[6] nor its text (Chap. 133, Wis. Stats.) provides any explicit support for a claim that the legislature intended such a limit on antitrust damage claims for unlawful price fixing. In fact, Wisconsin antitrust law provides an alternative measure of

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[5] As in *Milkovich v. Lorain Journal, supra,* it thus appears that any state law basis for the decision was linked to the court's understanding of federal law. Moreover, citation to state court decisions is not dispositive of the plain statement question. *E.g., New York v. P.J. Video, Inc.,* 475 U.S. at 872 n.4.

[6] The law was completely revised in 1980. *See* Committee Comment, Wis. Stat. Ann., Chap. 133 (West 1980).

damages for price fixing conspiracies: refund of the entire purchase price. Sec. 133.14, Wis. Stats. This remedy avoids the conceptual and practical problems identified in *Keogh* because such a refund does not require judicial review of the reasonableness of a particular rate nor the determination of some other, hypothetical competitive rate. As purely state law, therefore, the decision below would stand for the highly questionable and unexamined proposition that the Wisconsin legislature imposed a potentially stricter damage rule on those conspirators to which the *Keogh* doctrine applies than on any other kind of price fixer.[7] Hence, under the *Michigan v. Long* clear statement rule, this Court should conclude that the Wisconsin court's decision did not rest on a purely state law version of the filed tariff doctrine.

The decision also includes some comments about Wisconsin's insurance regulation and the powers of the Insurance Commissioner, Pet. App. 9-12, but any inference that these statements constitute a separate state ground based on some version of an exclusive jurisdiction theory with respect to restraints of trade in the insurance industry is implausible for several reasons. First, such a resolution of this case should not be inferred because the court assumed that the defendants' price fixing in fact violated the state antitrust law and that their victims were entitled to any remedy other than one based on a difference in rates. Pet. App. 11 & n.7. Second, when the Wisconsin legislature wanted to exempt aspects of insurance from state antitrust law, it said so explicitly. *See, e.g.*, sec. 133.04(4) Wis. Stats. (exempting certain price discrimination, if engaged in by insurers, from antitrust law). Thus, the Wisconsin court could not adopt a sweeping exemption from state antitrust law without what is plainly absent from the decision – a detailed consideration of both the insurance and antitrust statutory schemes as well as their legislative histories. Finally, the court's prior decisions had held that state

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[7] In their motion for reconsideration, the petitioners brought this conflict within state law to the attention of the court. Pet. App. 23-25. The court's refusal to reconsider its decision underscores that the court regarded the filed tariff doctrine as being outside the Wisconsin statutory scheme.

antitrust law is fully applicable to conduct occurring within the insurance industry absent a clearly stated and narrowly defined statutory exemption. *Grams v. Boss,* 97 Wis.2d 332, 294 N.W.2d 473 (1980); *Reese v. Associated Hospital Service,* 45 Wis.2d 526, 173 N.W.2d 661 (1970). Hence, to impose a sweeping exemption, the court would have had to reverse its own prior decisions. Nothing in the opinion suggests the court intended to do that.

3. With respect to the collateral estoppel effect of the *Brown* decision, respondents ignore the fact that it was not until the Court below based its decision on federal law that the collateral estoppel issue arose. Respondents simply argue the general rule that this Court has no jurisdiction to review a federal issue raised for the first time in a motion for reconsideration of the decision below that could have been raised earlier. MDL 633 Respondents Brief 6-7. They ignore the relevant exception, i.e., that when, as here, a federal issue is raised for the first time by the unexpected manner in which the court below decides the case, and a timely petition for rehearing raising that issue is denied without opinion, this Court has jurisdiction. *See* Pet. 27 n.23 (citing cases). None of the cases cited by respondents presents any reason to doubt the applicability of this exception here.

### C. Considerations of Federalism Justify Review

An important additional policy reason for review in cases raising substantively important issues where this Court's jurisdiction over state court decisions is challenged is the need to ensure that state courts, one way or the other, are accountable for all of their decisions.[8] So long as a state court

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[8] Petitioners set forth the factual and statutory basis for this Court's jurisdiction in their petition, with due regard for the requirements of Rule 14.1(e) and (h). Pet. 2, 6-7. Since jurisdiction is the exception to the rule that the Court does "not normally address any isues other than those fairly comprised within the questions presented. . . . ", *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 398 (1979), petitioners believe respondents' election to challenge such jurisdiction warrants our addressing in reply the significance of resolving that challenge.

explicitly decides state law cases by applying only state law, then the judges can be held accountable to the state's legislative and, in some states, electoral controls. However, when state courts rely on federal law they disable the usual state political processes and undermine the legitimate checks on their discretion. In such contexts, only this Court can restore the state courts' accountability. This Court has consistently demonstrated its concern for the separate and independent functioning of state and federal law.[9] *See* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power,* 100 Harv. L. Rev. 1485, 1509-1510 (1987); Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue,* 42 Duke L. J. 979 (1993).

This Court has recently addressed closely related aspects of the substantive federal-state relationship. In *Gregory v. Ashcroft, supra,* the Court observed:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government and it makes government more responsive by putting the States in competition for a mobile citizenry.

111 S. Ct. at 2399; *see also New York v. United States,* 112 S. Ct. at 2431 ("the Constitution divides authority between

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[9] *E.g., California v. ARC America Corp.,* 490 U.S. 93 (1989) (indirect purchasers may obtain damages under state antitrust law, asserted as a pendent claim in a federal case, even though such damages are not available under federal law); *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69 (1987) (state corporate law can impose special voting requirements in cases of corporate takeovers despite general authorization for and regulation of takeovers in federal law); *Wisconsin Public Intervenor v. Mortier,* 111 S.Ct. 2476, 2481 (1991) (trial court held that both state and federal law pre-empted local government imposition of additional regulations on use of pesticides; Wisconsin supreme court affirmed on the basis of federal law alone; this Court reversed only as to the interpretation of federal law).

federal and state governments for the protection of individuals . . . "). This federalism is imperiled if state courts unduly and inappropriately impose federal law to confine the power of the state's legislature and people. In *Gregory,* this Court used the clear statement standard of *Michigan v. Long* to limit the scope of federal legislation that would otherwise severely restrict an area (age limits on state judges) of primary concern to the states. Similarly in *New York v. United States,* this Court refused to countenance a coercive federal regulatory scheme whose objective was to compel the states to regulate a politically difficult subject area (nuclear waste) even though the states had agreed to be bound by the legislation. Such actions, as the Court pointed out, might well be rational self-interested conduct for both state and federal officials, but they created a serious problem of political responsibility. In effect, these officials sought to avoid direct accountability for their policies. Allowing the state court to avoid federal review in this case would introduce a similar dysfunction. By designating federal law as the basis of its decision, the state court has disabled the state's political process. Core federalism values depend on this Court's exercise of review to remove the false impression of federal restraint and to reinstate a properly functioning system of state and federal law.

The Wisconsin court's opinion invokes federal compulsion to deny a state law right in a way that this Court has repeatedly refused to accept. As the Petition in this case shows, the position of the Wisconsin court on the merits of the filed tariff doctrine involves a novel and extreme expansion of that limited and anachronistic doctrine. Had such a decision been based explicitly on state law grounds, the court would have been forced directly to reconcile its holding with its own prior decisions as well as the legislative scheme for imposing alternative remedies on unlawful price fixing. Such a decision would be subject to legislative review. By resting its result on purportedly controlling federal law, the Wisconsin court has denied to the legislature any opportunity to reverse this result as well as fashioned a kind of deniability for themselves when they next face the electorate.

Just as this Court has jurisdiction to review other conflicts within the federalist system, so to it has jurisdiction to review the holding in this case that federal law controls the scope of Wisconsin antitrust law remedies. Moreover, as in *Wold Engineering, supra,* once such jurisdiction exists, it is essential that this Court provide a comprehensive review of the merits of the federal law interpretation adopted by the state even as it explains to the state court that federal law does not in fact control its decision. After all, the error of the Wisconsin court in its decision is two-fold. First, it erroneously held that federal law controlled its decision.[10] Second, it erred as to the scope of the filed tariff doctrine in antitrust cases. These errors are manifestly interconnected, and it would not suffice to remand this case without full review of the court's interpretation of the substantive filed tariff doctrine.

Accordingly, the Court should grant the writ of *certiorari.*

Respectfully submitted,

JAMES MICHAEL CLABAULT*
LAW OFFICE OF
JAMES M. CLABAULT
7323 West Marine Drive
Milwaukee, WI 53223
(414) 351-1005

DAVID W. BROWN
KNOPF & BROWN
1050 Seventeenth Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 785-8200

PETER CARSTENSEN
Professor of Law
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53706
(608) 263-7416

SUSAN LACAVA
LAW OFFICES OF
SUSAN LACAVA
23 North Pinckney Street
Suite 320
Madison, WI 53703
(608) 258-1335

*Counsel of Record

*Attorneys for Petitioners*

---

[10] Petitioners recognize that this question is not entirely free from doubt in light of *Taffet, supra,* and *H.J. Inc., supra,* as well as the potential that due process considerations might, under some circumstances, limit the power of states to impose damage remedies with respect to regulated rates.